

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2016AP816-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2014CF507

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS L. MITCHELL,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Dennis Mitchell appeals judgments convicting him of soliciting prostitution and attempted kidnapping. He also appeals an order denying his postconviction motion. Mitchell argues: (1) the circuit court should have granted his motion to sever trial on the two charges; and (2) the court

improperly exercised its discretion by ordering Mitchell to register as a sex offender. We affirm the judgments and order.

BACKGROUND

¶2 The soliciting prostitution charge was based on a complaint by A.R. that a man, later identified as Mitchell, drove up behind her as she was walking near her home and motioned to her through his passenger window. After A.R. took off her headphones, Mitchell held up some money and offered her one hundred dollars for oral sex. When A.R. declined, Mitchell offered her more money and said “just get in the car.” After A.R. refused additional offers for \$500 and \$1000, A.R. attempted to take a photo of Mitchell and his vehicle. Mitchell drove off quickly before she could take the photo. A.R. eventually identified Mitchell from a photo the police obtained while investigating the attempted kidnapping two months later.

¶3 D.C., the victim of the attempted kidnapping, was a bartender at the Eager Beaver Bar & Grill. She testified Mitchell was a weekly regular at the bar where she knew him as “Dennis.” D.C. had previously declined Mitchell’s requests for a date. When D.C. finished her bartending shift and was walking to her car, she noticed Mitchell parked behind her car. When D.C. reached her car door, Mitchell approached and grabbed her by the throat and put a garbage bag over her head. D.C. managed to fight free from Mitchell and ran back into the bar. Neighboring residents saw Mitchell and attempted to detain him, but he was able to speed off in his vehicle.

¶4 When police arrived at the scene, they located the garbage bag, which contained a receipt for a can of orange air freshener that was recently purchased at a nearby Walmart. Walmart surveillance video from the time shown

on the receipt showed Mitchell at the checkout counter. When police executed a search warrant for Mitchell's vehicle, they found garbage bags, unwrapped and wrapped condoms, an ice pick, and an air freshener consistent with the one shown on the Walmart receipt.

¶5 In his interview with police, Mitchell denied grabbing or putting his hands on D.C., but admitted he was “hammered” and could not remember. Mitchell admitted he had a trash bag in his hand because he intended to clean his vehicle that night, but asserted he decided to drive away because he had too much to drink. Without prompting from police, Mitchell volunteered that he “never grabbed [D.C.] by the throat.” Mitchell also admitted that he pulled up beside A.R. and asked her for a date, but he denied soliciting her for prostitution.

¶6 While in custody, Mitchell spoke about the attempted kidnapping incident with another jail inmate. The inmate later told a detective that Mitchell told him he intended to put a plastic bag over D.C.'s head, render her unconscious, and take her from the scene to have sex with her.¹

¶7 Mitchell filed a motion to sever the charges. The circuit court denied the motion, finding the charges were close in time and motivated by

¹ The inmate's trial testimony was somewhat more equivocal regarding Mitchell's sexual motive. He testified Mitchell had been drinking and, “[h]e tried asking her out and she wasn't hearing it. So he—he was trying to make his move.” When asked whether Mitchell said why he put a bag over her head, the inmate responded,

He said he was going to take her somewhere. Like, he was going to remove her from there. Like I don't know what he was going to do when he got there or what was going to go on. I really didn't ask. I wasn't too keen on that.

At the time the circuit court decided the severance motion, the inmate's statement to the detective was the only evidence regarding Mitchell's motive.

Mitchell's desire for sexual gratification. The court also found that, even if the charges were severed, the State could introduce evidence of the other charge at the separate trials as other-acts evidence, and the relevancy of Mitchell's motive outweighed any prejudicial impact.

DISCUSSION

¶8 When reviewing a circuit court order denying a motion to sever charges, we initially determine whether the joinder was appropriate. That is a question of law that we decide without deference to the circuit court. *See State v. Linton*, 2010 WI App 129, ¶¶13-14, 329 Wis. 2d 687, 791 N.W.2d 222. If we conclude joinder was appropriate, we then review whether the circuit court properly exercised its discretion when it denied the defendant's motion for severance. *State v. Salinas*, 2016 WI 44, ¶30, 369 Wis. 2d 9, 879 N.W.2d 609.

¶9 Under WIS. STAT. § 971.12(1) and (4) (2015-16),² trial on two crimes may be joined if they are of the same or similar character, or are based on the same act or transaction, or are connected as parts of a common plan or scheme. Crimes are of the same or similar character if they occurred over a relatively short period of time and have overlapping evidence. *State v. Hamm*, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). Crimes occurring two years apart have been held to meet this standard. *Id.* The joinder statute is broadly construed in favor of initial joinder. *State v. Bellows*, 218 Wis. 2d 614, 622, 582 N.W.2d 53 (Ct. App. 1998).

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶10 The soliciting prostitution and attempted kidnapping charges were properly joined. The crimes constitute parts of a common scheme or plan. Both charges involve Mitchell's attempts to get women into his vehicle for sexual purposes, and his refusal to take "no" for an answer. The crimes occurred less than one mile apart. The soliciting prostitution charge is relevant to the attempted kidnapping charge because it shows Mitchell's motive for the kidnapping. Although sexual gratification is not an element of kidnapping, it is relevant to establish Mitchell's otherwise inexplicable motive for accosting D.C. Other overlapping evidence included A.R.'s identification of Mitchell after viewing the Walmart surveillance video obtained during investigation of the attempted kidnapping. Joinder is appropriate when evidence of one crime is discovered through police investigation of another crime. *Linton*, 329 Wis. 2d 687, ¶17. Although there are some factual differences between the charges, other-acts evidence need not be identical to the charged offense in order to be probative. *State v. Davidson*, 2000 WI 91, ¶72, 236 Wis. 2d 537, 613 N.W.2d 606.

¶11 Mitchell has not established that the circuit court improperly exercised its discretion by denying his motion to sever the charges. To be entitled to relief, Mitchell must show "substantial prejudice," which is a "higher degree of prejudice, or certainty of prejudice." *State v. Hoffman*, 106 Wis. 2d 185, 209-10, 316 N.W.2d 143 (Ct. App. 1982). The danger of unfair prejudice arising from a jury's exposure to evidence that the defendant committed more than one crime is minimized when evidence of both counts would be admissible at separate trials. *Id.* at 210. When offenses meet the criteria for joinder, it is rebuttably presumed that the defendant will suffer no prejudice from a joint trial. *State v. Leach*, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985). Here, the court properly weighed the

potential prejudice to Mitchell against the interest of the public in conducting a single trial on multiple counts. *See Bellows*, 218 Wis. 2d at 623.

¶12 Finally, the circuit court properly exercised its discretion when it ordered Mitchell to register as a sex offender. Under WIS. STAT. § 973.048(1m)(a), a sentencing court may, in its discretion, compel a defendant who has been convicted of attempted kidnapping to register as a sex offender if it determines that the underlying conduct was sexually motivated and that it would be in the interest of public protection to have the person report under WIS. STAT. § 301.45. Here, the court's finding that the attempted kidnapping was sexually motivated is supported by the condoms found in Mitchell's vehicle, statements Mitchell made to the other jail inmate, his attempt to lure A.R. into his car for sexual purposes, and Mitchell's failure to show any other motive for the attempted kidnapping. The attempted kidnapping occurred outside a bar on "lingerie night," and Mitchell had previously asked to date the victim, further suggesting a sexual motive for the attempted kidnapping.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).

